

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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No. 97-2793

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

CATHY WALLACE,

PLAINTIFF-APPELLANT,

v.

ADULT FAMILY CARE HOMES AND LABOR AND
INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS,

SOCIETY INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Marathon County:
RAYMOND F. THUMS, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. Cathy Wallace appeals a denial of worker's compensation benefits resulting from a Labor and Industry Review Commission

(LIRC) determination that an injury she received during a shooting incident did not arise out of her employment. Wallace contends that LIRC erred by finding that the attack arose out of a purely personal dispute, and by failing to properly determine whether the conditions of her employment facilitated or contributed to the assault. Because we conclude that LIRC properly determined both that the assault was purely personal and that the “positional risk” doctrine was inapplicable, the order is affirmed.

Wallace worked as a caregiver for Adult Family Care Homes, and lived in one of its group homes with her boyfriend and her daughter. As a result of her employment, Wallace was required to be on the premises twenty-four hours per day for at least five days a week. In addition, during all other times that Wallace was on site, she was responsible for the residents. Wallace was always the only staff present.

Wallace’s mother had a friend named Carl Steppert, Jr., a man Wallace had been acquainted with her entire life. When Wallace was younger, she regarded Steppert as a father figure, and Steppert treated Wallace’s daughter like a granddaughter. Wallace and Steppert had, through Wallace’s mother, engaged in social activities in the past, but this had apparently stopped two years prior to the shooting. Wallace also testified that she had not been to Steppert’s home in at least eight years. Over the past two years, Wallace claims, her only acquaintance with Steppert was through his volunteer work as a driver for the health care center.

Steppert confronted Wallace one morning at her group home and accused her of stealing between \$40,000 to \$50,000 from his home. Wallace denied any knowledge of the money and offered to call the police. Steppert refused, tore the phone from Wallace’s hands, and angrily left the residence.

About two days later, Steppert returned to the group home and again asked for Wallace. When her boyfriend told him that she was not there, Steppert left the residence.

Shortly thereafter Steppert went to a different group home where Wallace's mother worked as a caregiver. Steppert accused Wallace's mother of stealing his money, and when she denied it, shot a resident who was present during the dispute. Steppert then shot Wallace's mother and brother, and left the home without assaulting any other resident. Steppert next went to Wallace's group home, somehow managed to enter, and went into the bedroom where Wallace, her boyfriend, and her daughter were sleeping. Steppert shot Wallace's boyfriend, and demanded from Wallace the money he claimed she had stolen. Wallace tried to find enough money to make Steppert leave, but could not. Steppert then shot and killed Wallace's daughter, and shot Wallace in the face. As a result of this shooting, Wallace sustained multiple injuries, including the loss of her right eye.

Wallace sought worker's compensation for the injuries she sustained in the shooting. A hearing was held, after which the administrative law judge (ALJ) denied Wallace benefits. The ALJ concluded that the injury did not "arise out of" her employment, noting that Wallace failed to establish either how Steppert gained entry into the group home or how the facility placed her at a particular risk for Steppert's assault. Although the ALJ acknowledged that the conditions of Wallace's employment required her to be the only staff present and to sleep on the premises, the ALJ concluded that these attributes were not causative factors in the assault because the situation was not created by the risk of sleeping in the group home. Rather, the ALJ stated, "this assault could have occurred any time and any place." The ALJ also found that the dispute triggering the assault was personal and not work-related, and rejected her claim.

LIRC affirmed on appeal, and adopted the ALJ's findings and decision. In its memorandum opinion, LIRC noted that Steppert's motive was personal and that the evidence failed to indicate any connection between the assault and either Wallace's employment or Steppert's volunteer work. While acknowledging that Steppert shot one resident and Wallace's boyfriend, LIRC agreed with the ALJ that "this was not a random shooting of a madman" because Steppert shot no one else unconnected with the alleged theft. LIRC ultimately concluded that the evidence did not establish either any employment-related connection with, or exacerbation of, the assault. The circuit court also affirmed, and Wallace appeals.

On appeal, this court reviews LIRC's findings of fact and conclusions of law, not those of the circuit court. *UPS v. Lust*, 208 Wis.2d 306, 321, 560 N.W.2d 301, 306 (Ct. App. 1997). Whether Wallace's injury arose out of her employment presents a mixed question of law and fact. *Applied Plastics, Inc. v. LIRC*, 121 Wis.2d 271, 276, 359 N.W.2d 168, 171 (Ct. App. 1984).

LIRC's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. *Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis.2d 927, 931, 541 N.W.2d 241, 243 (Ct. App. 1995). Our role on appeal is to search the record for evidence supporting LIRC's factual determinations, not for evidence against them. *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975). We will uphold LIRC's factual determinations even if we believe that the weight of the evidence supports a contrary finding. *Hagen v. LIRC*, 210 Wis.2d 12, 20, 563 N.W.2d 454, 459 (1997).

In order to determine whether Wallace’s injuries arose out of her employment, the commission’s factual determinations are then applied to the relevant legal doctrines. In this case, the facts must establish the applicability of the “positional risk” doctrine.¹ Under that doctrine, an injury will arise out of employment:

if the conditions or obligations of the employment create a zone of special danger out of which the accident causing the injury arose. Stated another way, an accident arises out of employment when by reason of employment the employee is present at a place where he [or she] is injured through the agency of a third person, an outside force, or the conditions [of the location constituting a zone] of special danger.

Goranson v. DILHR, 94 Wis.2d 537, 555, 289 N.W.2d 270, 279 (1980). In those cases where a third-party assault causes an employee’s injury, the positional risk doctrine does not apply if the origin of the assault is purely personal and the employment conditions in no way contributed to the incident. *Weiss v. City of Milwaukee*, 208 Wis.2d 95, 107, 559 N.W.2d 588, 593 (1997).

Ordinarily, this court reviews an application of established facts to the applicable law de novo as a question of law. *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 659, 539 N.W.2d 98, 102 (1995). In certain situations, however, reviewing courts must give either great weight or due weight to an agency’s interpretation. *Id.* at 659-660, 539 N.W.2d at 102.

Great weight deference is appropriate once a court has concluded that: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is long-standing; (3) the agency employed its expertise or specialized knowledge in

¹ The applicability of this doctrine is Wallace’s sole argument for compensation.

forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id.

We hold that an appellate court should give great weight deference to LIRC's application of the positional risk doctrine. The commission has had substantial experience in determining whether causal relationships exist between employment and injury, and has been responsible for applying the positional risk doctrine in a variety of different cases for over forty years. Wallace disputes the applicability of great weight deference in this case because she claims LIRC lacks the requisite expertise. First, Wallace argues that LIRC has not established that it has any expertise in applying the positional risk doctrine "in cases involving the unique circumstances here." We do not agree, however, that LIRC has such an obligation. Although certain factual situations may arise that are so unique as to deprive a commission of its expertise, Wallace has not sufficiently demonstrated that this is the case here. Like all other positional risk cases, this case involves the determination of causal relationships between employment conditions and injuries. We therefore conclude that LIRC's special expertise is applicable to Wallace's specific circumstances.

Wallace next claims that LIRC lacks the requisite expertise because courts further developed the positional risk doctrine after LIRC's decision in this case. Wallace argues that the supreme court's decision in *Weiss* created a new focus in positional risk cases involving assaults, one looking more to whether the conditions of employment facilitated or contributed to the assault rather than to whether the motive of the assault was purely personal. We reject the argument that *Weiss* created so dramatic a change in the law. Nothing in *Weiss* suggests it was doing so, and Wisconsin courts have always stated the need to look into

whether employment conditions facilitated an assault. *See, e.g., Goranson*, 94 Wis.2d at 556-57, 289 N.W.2d at 280 (When it is clear that the origin of the assault was purely private and personal, and that the employment contributed nothing to the episode ... the assault should be held noncompensable.) (quotation omitted); *Allied Mfg., Inc. v. DILHR*, 45 Wis.2d 563, 567, 173 N.W.2d 690, 692 (1970) (holding that work conditions can invoke the positional risk doctrine without regard to whether an assault was purely personal). Because *Weiss* has not appreciably changed the law, we reject Wallace's suggestion that LIRC lacks the requisite expertise in positional risk cases.

Applying the great weight level of deference in this case requires us to uphold LIRC's determination of the applicability of the "positional risk" doctrine as long as that determination was "reasonable." *Harnischfeger*, 196 Wis.2d at 661, 539 N.W.2d at 102. An unreasonable determination is one without a rational basis. *Id.* at 661, 539 N.W.2d at 103.

Wallace argues that LIRC's finding that the attack arose out of purely personal motives, and was "not a random shooting of a madman," lacks the support of credible and substantial evidence. Instead, Wallace claims, the only "objective" evidence establishes that Steppert's actions were the product of delusional thinking. Relying on Larson's Workers' Compensation treatise, Wallace argues that there is a distinction "between situations in which the personal element was only imagined by the assailant and situations in which it was in fact present." ARTHUR LARSON AND LEX K. LARSON, 1 THE LAW OF WORKERS' COMPENSATION LAW § 11.23(d) (1997). Where the personal element is only imagined, Wallace concludes, the attack is more akin to the random acts of a madman and therefore should be classified as a positional risk. *See id.* at §§ 11.31, 11.32(b).

Assuming that Wisconsin courts should follow this distinction, the burden would have been on Wallace to prove that the personal element was only imagined. *See Leist v. LIRC*, 183 Wis.2d 450, 457, 515 N.W.2d 268, 270 (1994) (an applicant “has the burden of proving beyond a legitimate doubt all the facts essential to the recovery of compensation”). Wallace has not sufficiently done so. The only evidence Wallace introduced was her own testimony that she had not been at Steppert’s house in eight years, that she had seen Steppert over the past two years only through their workplace relationship, and that Steppert could not have had that sum of money available. Wallace did not offer any proof to substantiate that Steppert did not have a substantial amount of money, that he was not a victim of a theft, or that he suffered from delusions. We therefore do not believe that Wallace met her burden of showing the personal element in the attack was only imagined.

Based on the facts before it, LIRC could have properly found that Steppert’s motives were purely personal and not the random actions of a madman. Wallace and her family had known Steppert for many years, and the only people shot were Wallace, her family, and those unfortunate enough to be in the immediate vicinity. Steppert did not, as LIRC noted, approach other residents at the home, despite having had the opportunity to do so. Further, Steppert’s own accusation that Wallace stole his money is sufficient for LIRC to find that his motive behind the assault was purely personal. We therefore must affirm this finding.

Wallace next argues that LIRC’s legal conclusions lacked a rational basis because it erroneously interpreted the positional risk doctrine. Wallace argues that LIRC focused “almost exclusively” on whether the assault arose out of

factors purely personal to Wallace, rather than analyzing whether any conditions of employment contributed to or facilitated the assault.

We agree with Wallace that the mere fact that injuries arise out of a purely personal dispute is not dispositive in a worker's compensation case based on a third-party assault. "[W]hen the origin of the assault is purely private and personal, *and the employment in no way contributes to the incident*, the positional risk doctrine does not apply." *Weiss*, 208 Wis.2d at 107, 559 N.W.2d at 593 (emphasis added). We conclude, however, that LIRC considered all the appropriate factors, and could properly determine that the positional risk doctrine did not apply. The ALJ's decision, adopted by LIRC, acknowledged Wallace's argument that her employment required her to be in an "essentially isolated" place allowing Steppert easy access. The ALJ noted, however, that Wallace never established the method of entry or how her work conditions placed her at a particular risk for this specific assault. The ALJ also addressed Wallace's argument that she was required to be on site virtually all the time, and concluded that this was not a causative factor because the assault "could have occurred any time and any place." The consideration of these factors sufficiently demonstrates the reasonableness of LIRC's conclusion that the workplace did not facilitate the attack.

Wallace argues that LIRC's conclusions were erroneous because there was never a specific finding that the workplace did not "contribute to" or "facilitate" the attack. Wallace further refers us to several factors that she believes

sufficiently demonstrates this connection.² Our role on appeal, however, is not to independently decide whether any conditions of Wallace's workplace facilitated the attack. Instead, we simply determine whether LIRC's decision was reasonable. We conclude that it was. Although neither LIRC nor the ALJ used the magic words "contribute to" or "facilitate," their opinions sufficiently demonstrate that they considered these issues. The conclusion that Wallace failed to meet her burden is not unreasonable.

Wallace next argues that LIRC erred because, as a matter of law, the work condition requiring her to be on-site facilitated the attack because it allowed Steppert to know where she was. We do not agree. Knowing where to find an assault victim based on knowledge of where and when the victim is working does not establish, on its own, that the workplace conditions facilitated the attack. If this were a sufficient basis to establish the necessary connection, virtually every purely personal assault committed in the workplace would fall under the positional risk doctrine. This is not the law.

Wallace also attacks LIRC's determination that the condition that she be almost continually at work did not contribute to the assault because, she claims, LIRC's factual basis for rejecting this connection amounted to "rank speculation." LIRC reasoned that Wallace's work conditions had no connection with the assault, and that the evidence demonstrated the assault could have occurred at any time and any place. Wallace claims there are no facts to support this because the only evidence was her testimony that over the last two years she

² For support, Wallace claims that her only connections with Steppert over the last two years occurred because of the workplace relationship; Steppert's position as a volunteer driver permitted him to become familiar with the layout of the house; Wallace was the only employee at the house; and the house was not secured by means other than door locks.

had not seen Steppert at any other place than the group home. We uphold LIRC's finding. In concluding that the assault would have occurred regardless of Wallace's employment conditions, LIRC could reasonably rely on the undisputed facts that Wallace had seen Steppert outside of the workplace many times in the past and that Wallace was not always physically present at the workplace.

Wallace's final argument is that her isolated work environment facilitated the attack, and therefore *Allied Manufacturing* controls the outcome of this case. In *Allied Manufacturing*, the supreme court affirmed an award of benefits to an employee assaulted at the workplace. *Allied Mfg., Inc.*, 45 Wis.2d at 568-69, 173 N.W.2d at 693. The court concluded that the employee's work conditions—which required her to be in a building by herself—permitted the application of the positional risk doctrine because the “isolated work environment” created the necessary zone of danger. *Id.* at 566-67, 173 N.W.2d at 691-92.

Allied Manufacturing is readily distinguishable from this case. First, the case merely stands for the proposition that an isolated work environment *may* constitute a positional risk. *See id.* at 568, 173 N.W.2d at 692 (“We hold that *in the instant case* the isolated work environment in which the deceased worked constituted a zone of special danger and that the ‘positional risk’ doctrine is applicable.”) (emphasis added). Second, Wallace's conditions of employment, while they did require her to be the only *employee* on sight, did not require her to be the only *person* on site. Indeed, at the time of the assault, several residents were on the premises, as was Wallace's boyfriend. Unlike the employee in *Allied Manufacturing*, Wallace's conditions of employment caused her to be virtually surrounded by others, not isolated and in a position to invite an assault. We affirm LIRC's conclusion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

